UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff(s), **CASE NUMBER: 04-80372**
HONORABLE VICTORIA A. ROBERTS

v.

D-1 CARL MARLINGA,
D-2 RALPH R. ROBERTS,
D-3 JAMES BARCIA,

Defendant(s).
_____/

ORDER DENYING DEFENDANTS' JOINT MOTION FOR INTRODUCTION AND ADMISSION OF POLYGRAPH EVIDENCE

I. INTRODUCTION

This matter is before the Court on Defendants' Joint Motion for Introduction and Admission of Polygraph Evidence **[Doc. 90]**. For the reasons stated, Defendants' motion is **DENIED**.

II. BACKGROUND

The underlying facts have been set out in prior orders, e.g., Opinion and Order Regarding Motions to Dismiss, February 28, 2005.

Defendants Carl Marlinga ("Marlinga"), Ralph R. Roberts ("Roberts"), and James Barcia ("Barcia") are charged in a nine count Indictment issued by the Grand Jury on April

22, 2004.[1] Defendants are alleged to have engaged in various campaign contribution improprieties in connection with Marlinga's unsuccessful bid for election to the United States House of Representatives.

Roberts previously filed a Motion to Dismiss or Reformulate Count One as Duplicitous, and Roberts and Barcia filed Motions for Severance and Separate Trials. In light of the Court's rulings in Roberts and Barcia's favor on those motions,[2] the Government decided to recall the Grand Jury which originally heard the case, present witnesses and present reformulated indictments. In this motion, Defendants seek to compel the Government to present the results of privately-administered polygraph tests to the Grand Jury. They also request to present the same evidence at trial. Defendants further request an evidentiary hearing to enable them to demonstrate that, under the current state of the science, polygraph evidence meets federal court standards for admissibility.

Between November 2004 and January 2005, each Defendant submitted to a privately-administered polygraph examination which included questions pertaining to the allegations upon which the Indictment is based.[3] Defendants did not, prior to taking the polygraphs, solicit the Government's involvement or agreement that the results of the

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[1]Roberts is charged in three counts (I, II, and VII). Barcia is charged in two counts (V and VIII). Marlinga is charged in all counts.

[2]*See* Order and Opinion: (1) Granting Defendant Roberts' Motion to Reformulate Count One as Duplicitous; (2) Granting Defendants Roberts and Barcia's Motions for Severance Pursuant to F.R.Cr.P. 8(b); and (3) Declaring Moot Defendants Roberts and Barcia's Motions for Severance and Separate Trials Pursuant to F.R.Cr.P. 14(a), February 28, 2005.

[3]In their brief, Defendants list the date of Barcia's examination as January 14, 2004. The Court presumes this to be a typographical error.

examinations would: (1) be presented to the Grand Jury or (2) be admissible at trial. Defendants assert that seeking the Government's agreement would have been futile in light of the Government's policy to decline such requests.

After the polygraphs were completed, Defendants submitted the favorable results to the Government and requested that the results be presented to the Grand Jury. The Government declined. Marlinga then offered to take a Government-administered polygraph on the condition that the Government agree to present the results to the Grand Jury. The Government again declined. Barcia and Roberts presume that a similar offer by them would be met with the same response.

III. APPLICABLE LAW AND ANALYSIS

A. POLYGRAPH EVIDENCE TO THE GRAND JURY

Defendants contend that their polygraph results are exculpatory evidence which the Government is obligated to introduce to the Grand Jury. Defendants' assertion is contrary to an express ruling by the Supreme Court, and it is based on the false premise that the results indisputably negate the allegations against them.

The Supreme Court has unequivocally stated that the Government cannot be compelled to present exculpatory evidence to the Grand Jury. Because Defendants cite *United States v Williams,* 504 U.S. 36, 51-52 (1992), they are well aware that the *Williams* Court held that neither the judiciary nor the accused can require the government to present purported exculpatory evidence to a grand jury. The Court explained that such a requirement would transform the grand jury, which is an independent body, into an arm of the judiciary:

> **[R]equiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body.**
>
> It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge. See *United States v Calandra,* 414 U.S., at 343, 94 S.Ct., at 617. That has always been so; and to make the assessment it has always been thought sufficient to hear only the prosecutor's side. As Blackstone described the prevailing practice in 18th-century England, the grand jury was "only to hear evidence on behalf of the prosecution[,] for the finding of an indictment is only in the nature of an enquiry (sic) or accusation, which is afterwards to be tried and determined." 4 W. Blackstone, Commentaries 300 (1769); see also 2 M. Hale, Pleas of the Crown 157 (1st Am. ed. 1847). So also in the United States. According to the description of an early American court, three years before the Fifth Amendment was ratified, it is the grand jury's function not "to enquire (sic) ... upon what foundation [the charge may be] denied," or otherwise to try the suspect's defenses, but only to examine "upon what foundation [the charge] is made" by the prosecutor. *Respublica v Shaffer,* 1 U.S. (1 Dall.) 236, 1 L.Ed. 116 (O.T. Phila. 1788); see also F. Wharton, Criminal Pleading and Practice § 360, pp. 248-249 (8th ed. 1880). **As a consequence, neither in this country nor in England has the suspect under investigation by the grand jury ever been thought to have a right to testify or to have exculpatory evidence presented.** See 2 Hale, *supra,* at 157; *United States ex rel. McCann v Thompson,* 144 F.2d 604, 605-606 (CA2), cert. denied, 323 U.S. 790, 65 S.Ct. 313, 89 L.Ed. 630 (1944).

504 U.S. at 51-52 (emphasis added).

Defendants do not dispute that the *Williams* holding applies. Rather, citing Justice Stevens' dissent, they assert that a prosecutor's obligation to ensure fundamental fairness, nevertheless, requires the Government to introduce exculpatory evidence. It is elementary that this Court is bound by *majority* rulings, and not *dissents*, of the Supreme Court. Therefore, even if the Court was inclined, it is prohibited from entering an order which is

directly contrary to the majority holding in *Williams* and its reasoning.

Moreover, notwithstanding the *Williams* holding, neither Justice Stevens' dissent, the United States Attorneys' Manual ("the Manual") or the American Bar Association's Standards for Criminal Justice ("ABA Standards"), --- also relied upon by Defendants --- compels the Government to present Defendants' polygraph results. Justice Stevens, quoting the Manual, only said in his dissent that a prosecutor should be required to present clear, "substantial evidence which directly negates the guilt of the subject of the investigation." 504 U.S. at 69. The ABA Standards echo the Manual.[4]

Contrary to Defendants' assertion, not all would agree that polygraph results favorable to them are clear, substantial evidence of innocence. In fact, courts and the scientific community have yet to reach a consensus regarding whether polygraph tests are, indeed, reliable barometers of veracity, particularly when administered unilaterally, as was done here. *See United States v Sheffer,* 523 U.S. 303, 309-312 (1998)(noting the variance of opinion in the courts and the scientific community). Therefore, there is no basis to find that the evidence offered by Defendants is "substantial evidence which directly negates" their alleged guilt.

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[4]Per Defendants, under the heading "Quality and Scope of Evidence Before the Grand Jury," the ABA Standards state:

(b) No prosecutor should knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense.

American Bar Association Standards for Criminal Justice, Prosecution Function, Standard 3-3.6(b)(3d. ed. 1993).

B. POLYGRAPH EVIDENCE AT TRIAL

The Sixth Circuit disfavors the admission of polygraph evidence at trial, but it has not adopted a *per se* rule prohibiting the practice. *United States v Thomas,* 167 F.3d 299, 308 (6th Cir. 1999), *cert. den.,* 514 U.S. 1074 (1995). The admissibility of such evidence is left to the sound discretion of the trial court. *United States v Sherlin,* 67 F.3d 1208, 1216 (1995), *cert. den.,* 516 U.S. 1082 (1996); *Thomas*, 167 F.3d at 308. Nevertheless, the Sixth Circuit has repeatedly asserted that "unilaterally obtained polygraph evidence is almost never admissible under [Federal Rule of Evidence] 403[,]" because polygraph evidence obtained under such circumstances is not sufficiently probative.[5] *Sherlin,* 67 F.3d at 1217 (*quoting Conti v Commissioner,* 39 F.3d 658, 663 (6th Cir. 1994), *cert. den.,* 514 U.S. 1082 (1995))(quotation marks omitted). *See also Thomas,* 167 F.3d at 308-309. The *Sherlin* Court explained that "in the absence of a prior agreement between the parties that the results of an examination would be admissible, the probative value of the polygraph is substantially less because the defendant would have no adverse interest at stake in the polygraph." 67 F.3d at 1217.

Likewise, in *Thomas*, the Court upheld the trial court's refusal to hold an evidentiary hearing or admit polygraph results that defendant claimed showed that he was not involved in a particular shipment of marijuana. The Court stated that a ruling to the contrary would

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[5]Federal Rule of Evidence ("FRE") 403 states that even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

have been subject to reversal since the government was not informed about the test until after the fact and, therefore, was not permitted to assist in the formulation of the questions or counter with questions regarding the extent to which the defendant was otherwise involved. In its analysis, the Court also pointed out that it had no way of knowing whether the polygraph offered was the first one administered.

The facts of this case are not materially distinguishable from those in *Thomas*. The Government did not participate in the administration of Defendants' privately commissioned tests; it was not even made aware of the tests or the results until after they were complete. Thus, like the *Thomas* defendant, Roberts, Barcia, and Marlinga "had no adverse interest at stake" in electing to take the tests. Under these circumstances and for the same reasons asserted by the *Sherlin* and *Thomas* courts, this Court finds that Defendants' polygraph results are not probative and, therefore, are excludable under FRE 403.

Even if the Court were to find that the polygraph results are probative, their probative value is substantially outweighed by the danger of unfair prejudice. Defendants offer their polygraph results for no purpose other than to bolster their claims of innocence. Indeed, Defendants acknowledge that the proffered evidence "goes to the heart of the case." Def. br. at p. 13. However, the *Sherlin* Court noted that "use of a polygraph solely to bolster a witness' credibility is 'highly prejudicial,' especially where credibility issues are central to the verdict." 67 F.3d at 1217 (citation omitted). Roberts, Barcia, and Marlinga can hardly deny that credibility will be central to the jurors' finding of guilt or innocence. The polygraph results are excludable on this basis as well.

Because the Court finds that Defendants' polygraph evidence is inadmissible under FRE 403, it is not necessary for the Court to consider the admissibility of such evidence under the standards established by the Supreme Court in *Daubert v Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993).[6] *See Conti,* 39 F.3d at 663 (finding that it was not necessary to perform *Daubert* analysis where polygraph results were inadmissible under FRE 403); *Sherlin*, 67 F.3d at 1217.

Defendants' motion is **DENIED**.

IT IS SO ORDERED.

/s/ Victoria A. Roberts
VICTORIA A. ROBERTS
UNITED STATES DISTRICT COURT

Dated: 4/12/05

[6]*Daubert* set the standard for admission of scientific expert testimony under FRE 702.